IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 31113/31114

STATE OF IDAHO,	)	
	)	**2006 Opinion No. 30**
Plaintiff-Respondent,	)	
	)	**Filed: May 5, 2006**
v.	)	
	)	**Stephen W. Kenyon, Clerk**
WILLIAM O. FIELD,	)	
	)	
Defendant-Appellant.	)	
	)	

Appeal from the District Court of the Sixth Judicial District, State of Idaho, Bannock County. Hon. Peter D. McDermott, District Judge.

Judgment of conviction for sexual battery, affirmed; judgment of conviction for lewd and lascivious conduct with a minor under sixteen, vacated and case remanded.

Nevin, Benjamin & McKay, LLP, Boise, for appellant. Dennis A. Benjamin argued.

Hon. Lawrence G. Wasden, Attorney General; Jessica M. Lorello, Deputy Attorney General, Boise, for respondent. Jessica M. Lorello argued.

LANSING, Judge

In this consolidated appeal, William Field appeals his judgments of conviction for lewd conduct and sexual battery. Field argues the trial court made several errors that cumulatively entitle him to new trials. These alleged errors include improper joinder of two cases for trial, allowing hearsay evidence under the excited utterance exception, and allowing evidence of Field's uncharged misconduct. Field also asserts he was entitled to a mistrial because the prosecutor mentioned an unrelated investigation into Field's alleged misconduct with his stepdaughter. Lastly, Field argues that his sentences are excessive.

I.
BACKGROUND

Field was charged with lewd conduct with a minor under sixteen years of age, Idaho Code § 18-1508, and sexual battery of a minor child sixteen or seventeen years of age, I.C. § 18-

1508A(1)(c), (3). The two charges were made in separate cases and arose from Field's interaction with two minor females on dates nearly two years apart.

The lewd conduct charge was based on allegations that Field digitally penetrated seven-year-old H.P. while Field and his wife, Nanci, were babysitting her at their home in September 2003. According to H.P., Field was sitting in a chair and as H.P. passed by he invited her to sit on his lap. She complied, and Field then began rubbing her stomach underneath her shirt. H.P. testified that Field navigated his hand beneath her underwear, put his finger inside her vagina, and asked her, "Does that feel good?" H.P. stayed at Field's home that night, went to school the next day, returned to Field's house after school, stayed the night again, and went to school the following day. On this second day, H.P.'s father picked her up after school and drove her to her mother's house. H.P. told no one of Field's conduct until she disclosed it to her sister and their mother roughly forty-eight hours after the alleged incident.

The sexual battery allegedly occurred in the fall of 2001. The Fields arranged for two teenage girls, T.B. and K.A., to stay at the Field residence for several days and babysit Nanci's thirteen-year-old daughter, A.C., while the Fields traveled to Utah. According to T.B., who was seventeen at the time, one evening during this babysitting stint, Field returned home unexpectedly while K.A. was at work and T.B. was at the Field home with A.C. Field retired to the basement of the home and asked A.C. to come downstairs. A.C. went to the basement alone. Nearly thirty minutes later, T.B. went downstairs to notify A.C. of a telephone call and found A.C. and Field in a bed together. When T.B. announced that A.C. had a phone call, A.C. left the bed fully-clothed and went upstairs. Field then asked T.B. to come visit him in the bed so he could give her a backrub. T.B. complied and lay on her stomach next to Field. According to T.B., Field began rubbing her back and shoulders, first above her clothing, but soon reaching underneath. After a few minutes, Field began kissing T.B.'s face and back and telling her she was "beautiful," her "skin was soft," and that he liked touching her. He reached inside T.B.'s underwear, rubbed her buttocks, and attempted to pry between her legs. T.B. held her legs tightly together and then got out of the bed and went upstairs. T.B. did not tell anyone of this episode until two years later, when she reported it to the police after hearing of H.P.'s allegations concerning Field.

T.B. also told the police that Field had recently contacted her and asked her for names of people with whom H.P.'s mother might have slept--information Field apparently intended to use

for character assassination purposes. T.B. agreed to help the police by making recorded "pretext" telephone calls to Field. During these calls, T.B. confronted Field about the incident in 2001 and, although the conversation was disjointed and fairly vague, Field indirectly acknowledged and apologized to T.B. for his conduct that night in his basement two years earlier.

Field was subsequently charged with lewd conduct for the incident with H.P. and with sexual battery for the incident with T.B. The State moved to join the two cases for trial pursuant to Idaho Criminal Rules 8(a) and 13 on the ground that the alleged incidents were connected together or constituted parts of a common plan or scheme by Field. The district court granted the motion over Field's objection. A jury found Field guilty on both counts. The court imposed a unified fifteen-year sentence with five years determinate for sexual battery and a concurrent unified thirty-five-year sentence with fifteen years determinate for lewd conduct. Field appeals, asserting several errors by the district court.

II.
ANALYSIS

A. Evidentiary Issues

1. H.P.'s out-of-court statements

Over Field's objections, H.P.'s mother and sister were allowed to testify about their conversations with H.P. the night she returned home after staying at the Fields' house. H.P.'s sister, S.P., testified that H.P. seemed upset when she came home and that, after being urged by S.P. to reveal what was bothering her, H.P. said that Field had touched her "in her privatal area."[1] S.P. then took H.P. to their mother, Nichole. Nichole testified, again over Field's

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[1] S.P.'s testimony, in pertinent part, was as follows:

> Q: Could you please tell the jury what was happening before you had this conversation with [H.P]?
> A: [H.P.] was really, I guess, upset and not talking to anybody. Being mean.
> Q: So what did you do?
> A: I waited until it was after bedtime and I went in [H.P.'s] room and asked her what was up.
> Q: And what did she do?
> A: She is, like, "I don't want to tell you."
> Q: What did you say?

hearsay objection, that H.P. was very upset and told Nichole that Field "put his finger in my hole." On appeal, Field argues that the admission of this hearsay testimony was error. The State contends that the district court properly admitted the testimony because H.P.'s statements to her sister and mother fell within the excited utterance exception to the hearsay rule.

Out-of-court statements offered into evidence for the truth of the matter asserted are generally inadmissible as hearsay. Idaho Rule of Evidence 802. The excited utterance exception authorizes the admission of hearsay if the testimony recounts a "statement relating to a startling event or condition while the declarant was under the stress of excitement caused by the event or condition." I.R.E. 803(2). To fall within this exception, there must be a startling event that renders inoperative the normal reflective thought process of the observer, and the declarant's statement must be a spontaneous reaction to that event rather than the result of reflective thought. *State v. Parker*, 112 Idaho 1, 4, 730 P.2d 921, 924 (1986); *State v. Doe*, 140 Idaho 873, 876, 103 P.3d 967, 970 (Ct. App. 2004); *State v. Hansen*, 133 Idaho 323, 325, 986 P.2d 346, 348 (Ct. App. 1999). In considering whether a statement constitutes an excited utterance, the totality of the circumstances must be considered, including the nature of the startling condition or event, the amount of time that elapsed between the startling event and the statement, the age and condition of the declarant, the presence or absence of self-interest, and whether the statement was volunteered or made in response to a question. *Doe*, 140 Idaho at 877, 103 P.3d at 971. Whether to admit a statement as an excited utterance is committed to the trial court's discretion, *State v. Bingham*, 116 Idaho 415, 421, 776 P.2d 424, 430 (1989); *Doe*, 140 Idaho at 876, 103 P.3d at

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A: I said, "You can tell me; I'm your big sister."
Q: And then what happened?
A: Then she is, like, "Okay."
[Field's hearsay objection is overruled.]
Q: [S.P.], so then what did you do?
A: She was like--so then I said, "[H.P.], please tell me," and she said, "Okay."
Q: And how was she acting?
A: Really nervous.
Q: So what did she tell you?
A: She said that Bill Field had touched her in her privatal [sic] area.

970, and that decision will not be disturbed on appeal absent an abuse of that discretion. *Id.* at 877, 103 P.3d at 971.

Field does not argue that his alleged digital penetration of H.P. was not a startling event. Indeed, the sudden invasion of her person by a trusted adult caretaker could not be viewed otherwise. Whether H.P.'s statements to her mother and sister were spontaneous reactions to that event rather than the result of reflective thought, however, is a more problematic issue. In holding that H.P.'s statements made two days after the startling event fell within the excited utterance exception, the district court concluded that H.P.'s appearance of being distraught or upset, coupled with the time frame and the fact that she made her disclosures at her "first real opportunity to tell a close family member," sufficed to show that the statements were spontaneous reactions rather than the result of reflective thought.

We have recognized that where the hearsay statement was a victim's disclosure of a sexual assault, the Idaho appellate courts have given the excited utterance exception a more liberal application than is given in other circumstances. *Hansen*, 133 Idaho at 326, 986 P.2d at 349. This line of authority began with *Parker*, where the Idaho Supreme Court affirmed the admission of a fourteen-year-old girl's statement that she had been raped, made to a family member about three hours after the crime. The *Parker* Court explained:

> The tendency to admit such statements, even when made hours after the event, probably lies in their high probative value. Given that sexual assault crimes violate one's most intimate physical and mental feelings, the victim can reasonably be expected not to discuss the crime until meeting with a family member, close friend, law enforcement agent, or other trusted individual.
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> . . . .
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> A sexual assault is one of the most distressing experiences a person could have. The distress is likely to remain bottled up in the victim until she or he can talk about what happened.

Parker, 112 Idaho at 4, 730 P.2d at 924. Subsequent decisions have followed the *Parker* court's analysis that the unique stresses experienced by a sex offense victim, particularly youthful ones, lends reliability to their initial statements about the crime, even when several hours have passed since the event. However, that line of cases supports, at most, a lapse measured in hours--not in days--between a startling event and the subsequent statement. *See Bingham*, 116 Idaho at 421, 776 P.2d at 430 (statement made by twelve-year-old child within two hours of molestation); *Parker*, 112 Idaho at 3-4, 730 P.2d at 923-24 (statement made by fourteen-year-old child within two or three hours of molestation); *Doe*, 140 Idaho at 877, 103 P.3d at 971 (statement made by

four-year-old child within twenty minutes of incident); *State v. Kay*, 129 Idaho 507, 517, 927 P.2d 897, 907 (Ct. App. 1996) (statement made same night as abduction and molestation); *State v. Valverde*, 128 Idaho 237, 239-40, 912 P.2d 124, 126-27 (Ct. App. 1996) (statement made within thirty minutes of incident); *State v. Parkinson*, 128 Idaho 29, 36, 909 P.2d 647, 654 (Ct. App. 1996) (statement made within a "few minutes" of incident); *State v. Stover*, 126 Idaho 258, 263, 881 P.2d 553, 558 (Ct. App. 1994) (statement made within a "few hours" of incident); *State v. Peite*, 122 Idaho 809, 816-17, 839 P.2d 1223, 1230-31 (Ct. App. 1992) (statement made within fifteen or twenty minutes of incident). Although no bright line has been drawn--and one likely should not be drawn--it is nevertheless clear that at some point, the time span between a startling event and a subsequent statement simply becomes too great for the statement to be considered an excited utterance even when the declarant is a child. *See, e.g.*, *State v. Zimmerman*, 121 Idaho 971, 975-76, 829 P.2d 861, 865-66 (1992) (holding that five-year-old's statement made at least five days after incident was not excited utterance).

We conclude that in the circumstances presented here, H.P.'s statements occurred too long after the event to be considered excited utterances. Before her disclosure, she had spent two days at school and rode in a car with her father, and thus had waited to tell her story well beyond her first meeting with a family member, close friend, teacher, or other trusted individual. On these facts, it cannot be said that H.P.'s statements to her mother and sister were spontaneous reactions to the alleged event with Field rather than the result of reflective thought. There was ample time for a child of H.P.'s age to gather her thoughts and consider her words regarding any events that took place at Field's home two days earlier. H.P.'s statements to her mother and sister should have been excluded as hearsay because they were not admissible as excited utterances.

2. K.A.'s testimony

Field contends that the district court erred by allowing T.B.'s friend and fellow babysitter, K.A., to testify about inappropriate conduct and sexually suggestive comments by Field that were unrelated to the charged offense. As mentioned above, K.A. stayed at the Fields' house with T.B. to babysit A.C. while the Fields traveled to Utah. K.A., who was eighteen at the time of the babysitting duties, had known Field for several years because he was a friend of her parents. When she was fifteen, K.A. briefly worked for Field's business which was operated out of his home. At trial, she not only testified about the events during the weeks that she and T.B.

were babysitting, but also testified that over a period of years, Field often spoke to her in a sexually-suggestive manner. She said: "Every conversation you ever had with [Field] had some sort of an invitation or some lewd comment or something. I mean, there was never a conversation without some sort of perverted talk in there." Examples of Field's "perverted talk," according to K.A., included: "If you're going to be my fourth wife, we should get some practice in. Let's go take a tumble in the hay back in the bedroom," and "We can watch ourselves [in the full-length mirror], see what we look like together." These conversations, K.A. said, had been occurring since she worked for Field as a fifteen-year-old. K.A. further testified that the morning after Field's alleged incident with T.B., Field said to K.A., "Oh, there is my next wife," "Come sit by me," and "Come sit on the couch and give me some love." When she complied by sitting next to him, he hugged her and rubbed her leg and said, "How about if you and I go take a tumble in [the master bedroom bed]. Let's see if it works for both of us." K.A. testified that she declined Field's invitation and "always passed [Field's] comments off as bogus."

Prior to trial, the State filed a motion to determine the admissibility of K.A.'s testimony about Field's conduct with K.A. The State argued that this testimony was admissible as evidence of Field's intent or plan to sexually abuse young women and because it showed Field's lustful disposition. Over Field's objection, the district court allowed K.A.'s testimony to show Field's "common scheme or plan or absence of mistake or inadvertence," finding the probative value of her testimony was not outweighed by unfair prejudice to Field. At trial, following K.A.'s testimony, the district court instructed the jury that evidence of other bad acts may not be considered to show the defendant's bad character and may only be used for proving the defendant's motive, intent, plan, knowledge, or the absence of mistake or accident. Field contends on appeal that K.A.'s testimony regarding Field's suggestive comments to her was inadmissible under I.R.E. 404.

Generally, "[e]vidence of a person's character or a trait of character is not admissible for the purposes of proving that the person acted in conformity therewith on a particular occasion." I.R.E. 404(a). Additionally, evidence of other misconduct is inadmissible to prove the character of a person in order to show that he committed the crime for which he is on trial. I.R.E. 404(b). Nevertheless, evidence of other misconduct may be admissible for other purposes, such as "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." I.R.E. 404(b). In the context of sex crimes involving minor victims, Rule 404 does

not preclude evidence of uncharged conduct if the conduct demonstrates a common plan or scheme that corroborates the victim's testimony. *Moore*, 120 Idaho at 745, 819 P.2d at 1145. The *Moore* Court held that evidence of the defendant's "general plan to exploit and sexually abuse an identifiable group of . . . victims" is relevant and admissible. *Id. See also State v. Siegel*, 137 Idaho 538, 541, 50 P.3d 1033, 1036 (Ct. App. 2002); *State v. McGuire*, 135 Idaho 535, 538, 20 P.3d 719, 722 (Ct. App. 2001). The Court reasoned that "[c]orroborative evidence in sex crime cases involving youthful victims is often times necessary to establishing the credibility of a young child [because] . . . . [t]oo often the determination of the case rests strictly upon establishing that the victim's testimony is more credible than that of the alleged perpetrator." *Moore*, 120 Idaho at 746, 819 P.2d at 1146. Testimony by other victims is considered corroborative because "[e]vidence of all the incidents of abuse, taken together, may provide an evidentiary plan or pattern that tends to make the alleged incidents more plausible and probable." *Id. See also State v. Tolman*, 121 Idaho 899, 904, 828 P.2d 1304, 1309 (1992); *State v. Doe*, 136 Idaho 427, 431, 34 P.3d 1110, 1114 (Ct. App. 2001). That is, testimony about other uncharged incidents evidencing a common criminal design may render the jury "better able to compare patterns and methods, details and generalities, consistencies and discrepancies, and thereby [make] a more meaningful and accurate assessment of the parties' credibility." *Tolman*, 121 Idaho at 905, 828 P.2d at 1310; *State v. Scovell*, 136 Idaho 587, 590, 38 P.3d 625, 628 (Ct. App. 2001).

Evidence of a defendant's molestation of another child may also be admissible to show a lustful intent. *See, e.g.*, *State v. Tapia*, 127 Idaho 249, 254-55, 899 P.2d 959, 964-65 (1995) (admission of evidence affirmed because it was relevant to show defendant's intent to gratify his sexual desire); *McGuire*, 135 Idaho at 538, 20 P.3d at 722 (affirming admission of evidence where defendant made issue of whether he acted with the intent to gratify his lust, passions, or sexual desires, and noting that Idaho appellate courts have previously affirmed the admission of similar evidence where the intent of the defendant was at issue); *State v. Spor*, 134 Idaho 315, 319, 1 P.3d 816, 820 (Ct. App. 2000) (concluding that the district court properly admitted

evidence of prior uncharged misconduct because it was relevant to show the defendant's lustful intent).[2]

When the admission of evidence of uncharged misconduct is challenged on appeal, our analysis is two-pronged:

> First, the evidence must be relevant to a material and disputed issue concerning the crime charged. *State v. Moore*, 120 Idaho 743, 745, 819 P.2d 1143, 1145 (1991). Whether evidence is relevant is an issue of law. *State v. Raudebaugh*, 124 Idaho 758, 864 P.2d 596 (1993). Therefore, when considering a district court's admission of evidence of prior misconduct, we exercise free review of the trial judge's relevancy determination. The second step in the analysis is the determination that the probative value of the evidence is outweighed by unfair prejudice. When reviewing this step we use an abuse of discretion standard. *State v. Atkinson*, 124 Idaho 816, 819, 864 P.2d 654, 657 (Ct. App. 1993), *cert. denied*, 511 U.S. 1076, 114 S. Ct. 1659, 128 L.Ed.2d 376 (1994).

State v. Pilik, 129 Idaho 50, 53, 921 P.2d 750, 753 (Ct. App. 1996). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." I.R.E. 401.

The challenged testimony here consisted of two types of acts: one was Field's history of "perverted talk," and the other involved his acts on the morning after the alleged incident with T.B. We must consider each of these categories of acts separately and we must address separately their admissibility in each of the two criminal cases that were tried together--the alleged lewd conduct with H.P., and the alleged sexual battery involving T.B.

K.A.'s testimony regarding Field's comments and acts the morning after the alleged incident with T.B. was admissible with respect to the alleged offense against T.B. These acts

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[2] We note, however, that Idaho's appellate courts have *not* held that evidence merely showing a defendant's "lustful disposition" is permitted under Rule 404(b). Although the phrase "lustful disposition" appears in several reported decisions, including *Moore*, a close examination reveals that no case has rested admissibility under Rule 404(b) solely on the evidence's ability to show the defendant's lustful disposition. *See State v. Phillips*, 123 Idaho 178, 180, 845 P.2d 1211, 1213 (1993) (describing district court's findings in *Moore*); *Moore*, 120 Idaho at 744, 745, 819 P.2d at 1144, 1145 (describing district court findings); *Spor*, 134 Idaho at 319, 1 P.3d at 820 (quoting district court's use of phrase "lustful disposition"); *State v. Clay*, 112 Idaho 261, 269, 731 P.2d 804, 812 (Ct. App. 1987) (holding evidence that only showed defendant's "lustful disposition" irrelevant to the issue at hand); *State v. Maylett*, 108 Idaho 671, 673, 701 P.2d 291, 293 (Ct. App. 1985) (describing trial court's conclusion as based in part on a "lustful disposition" rationale, but affirming the trial court only on the ground that evidence was probative of defendant's intent).

and remarks to K.A. were similar to the alleged acts and comments directed toward T.B. the night before. According to both girls' accounts, Field summoned each girl to come close to him, invited each to get in bed with him, touched each of them, and made sexually provocative remarks to each of them. Field's behavior to which K.A. testified was very similar to the charged acts in T.B.'s case, was directed toward a young woman of about the same age as T.B., and occurred within hours of the alleged offense against T.B. Because of these similarities, K.A.'s testimony was relevant to corroborate T.B.'s testimony concerning the charged sexual battery. We do not perceive that the probative value of this evidence was substantially outweighed by unfair prejudice and, therefore, K.A.'s testimony regarding her interaction with Field the morning after the alleged incident with T.B. was admissible as to the sexual battery charge.

In contrast, K.A.'s testimony about Field's history of "perverted talk" toward her over the years was not relevant because it did not tend to make more or less probable a material or disputed issue concerning the sexual battery involving T.B. Evidence that over a period of years Field engaged in distasteful, sexually suggestive repartee in the workplace and other settings is too dissimilar to the charged offense to have probative value. Its effect was to portray Field as a man of poor character, a "dirty old man;" it does not show that Field had a "common criminal design," *Moore*, 120 Idaho at 746, 819 P.2d at 1146, to invite young women over to him and then touch them sexually. This evidence of misconduct that was limited to flirtatious or sexually suggestive conversation, unaccompanied by inappropriate touching, was not sufficiently similar to Field's alleged *physical* molestation of T.B. to be corroborative of T.B.'s testimony. To the extent that this testimony had any probative value, in our view that value was far outweighed by the risk of unfair prejudice as a generalized attack on Field's character--an attack of the sort that is prohibited by I.R.E. 404. Therefore, K.A.'s testimony about Field's general history of "perverted talk" should not have been admitted at trial.

With respect to the lewd conduct charge for Field's alleged acts with H.P., we conclude that none of K.A.'s testimony was admissible. The dissimilarity between Field's conduct to which K.A. testified and the charged physical acts with H.P., and the significant difference in the

girls' ages, forecloses any probative value. Evidence of other misconduct generally will be relevant to corroborate a sex offense victim's allegations, only if the conduct was "intimately and inseparably connected with the circumstances of this specific offense" or "similar" to the offense being alleged. *Moore*, 120 Idaho at 746, 819 P.2d at 1146; *Tolman*, 121 Idaho at 904, 828 P.2d at 1309. That is, the defendant's uncharged misconduct and the victims of that misconduct must be similar to the misconduct and the victim in the case being tried. *State v. Wood*, 126 Idaho 241, 246-47, 880 P.2d 771, 777 (Ct. App. 1994) (evidence that defendant had pushed adult woman against the wall with hands on her throat during an argument and shoving match not sufficiently similar to be relevant on charge that defendant killed two-year-old child by unprovoked blow to the head); *State v. Roach*, 109 Idaho 973, 975-76, 712 P.2d 674, 676-77 (Ct. App. 1985) (evidence of forced sexual act with mother not relevant to prove unlawful, but consensual, sexual acts with fourteen-year-old boy). Field's history of obnoxious sexual comments to a female fifteen to eighteen years of age does not tend to corroborate H.P.'s testimony nor show it to be more likely that Field would commit a physical sexual attack on a pre-pubescent seven-year-old girl. The testimony does not demonstrate a common criminal design to engage in actual physical sexual molestation of young children. With respect to Field's trial for the alleged lewd conduct with H.P., K.A.'s testimony presented only the sort of character evidence that I.R.E. 404 prohibits.

B. Prosecutorial Misconduct

Before trial, Field filed a motion in limine to prevent the State from disclosing to the jury that an investigation had been conducted on an allegation that Field engaged in sexual misconduct with A.C., his stepdaughter, when she was thirteen. The court took the motion under advisement, stating that admissibility of the information would depend upon whether defense evidence would open the door to this line of inquiry. During direct examination of Field's wife, Nanci, defense counsel asked her to describe Field's relationship with A.C. Nanci said that the two had a very positive relationship. Then on cross-examination, the prosecutor attempted to elicit information about the investigation of Field's conduct with A.C. The examination went as follows:

Q: How did they [Field and A.C.] act around each other?
A: Just like a father and daughter would act.
Q: Do you have any concerns about that?
A: I don't.

Q: Seemed appropriate?
A: Yes.
Q: In fact, [Field] was investigated concerning his relationship--

At this point, defense counsel interrupted with an objection. During argument outside the jury's presence, the district court learned that the referenced investigation had been prompted by the allegations of A.C.'s biological father, perhaps made as retaliation during his divorce from Nanci. The district court disallowed the testimony, concluding that any probative value was outweighed by unfair prejudice to Field. Field immediately moved for a mistrial, which the district court denied. Field later moved for a new trial based on the prosecutor's mention of the investigation, which motion was also denied.

On appeal, Field argues that the district court should have granted his motions because "the clear inference of the [prosecutor's] question, the fact that defense counsel was forced to object to the question, the fact that the Court dismissed the jury immediately after the objection and the absence of a curative instruction at the time of the occurrence and in the jury instructions prejudiced Mr. Field." He asserts that the prosecutor's question amounted to prosecutorial misconduct that deprived Field of his right to a fair trial.

Field's argument is without merit. An assertion of prosecutorial misconduct requires an objective determination of whether the defendant received a fair trial. *State v. Smith*, 116 Idaho 553, 557, 777 P.2d 1226, 1230 (Ct. App. 1989). Here, as the district court noted, Field's immediate objection cut the prosecutor's question short, and Nanci never answered it. At the conclusion of all the evidence, the jury was instructed not to consider any questions to which objections were sustained or to speculate as to what the answer might have been. It is generally presumed that the jury follows such an instruction absent compelling reason to doubt the efficacy of the instruction, *State v. Trejo*, 132 Idaho 872, 879, 979 P.2d 1230, 1237 (Ct. App. 1999); *State v. Curtis*, 130 Idaho 525, 528, 944 P.2d 122, 125 (Ct. App. 1996). Field has not shown that the prosecutor's question so infected the proceedings that it deprived him of a fair trial and thereby warranted the declaration of a mistrial or an order for a new trial.

C. Joinder

Field contends the district court erred in joining the sexual battery and lewd conduct cases for a single trial and that he suffered substantial prejudice as a result of the joinder. The propriety of a joinder for trial is a question of law and is therefore subject to *de novo* review. *State v. Anderson*, 138 Idaho 359, 361, 63 P.3d 485, 487 (Ct. App. 2003).

A court may order two or more complaints, indictments or informations to be tried together if the offenses charged are based on the same act or transaction, or on two or more acts or transactions connected together or constituting parts of a common scheme or plan. I.C.R. 8(a); I.C.R. 13; *Anderson*, 138 Idaho at 361, 63 P.3d at 487. Until I.C.R. 8(a) was amended in 1980, joinder was also proper if the offenses charged were of the "same or similar character." *See State v. Abel*, 104 Idaho 865, 866, 664 P.2d 772, 773 (1983). The Idaho Supreme Court's amendment of Rule 8(a) presumably was intended to reduce the circumstances in which joinder would be considered proper, and courts must therefore be mindful that joinder is not permissible merely because the offenses are of the same or similar character.

We conclude that the joinder of the two cases against Field was error. Field's alleged criminal acts with the two girls, occurring years apart, clearly were not part of the same act or transaction. And, contrary to the State's argument, the crimes were not "connected together" by Field's attempt to involve T.B. in the other case by asking her to assist him in acquiring embarrassing information about H.P.'s mother. That conduct was not a part of either charged offense. Finally, Field's alleged acts with H.P. and T.B. were not part of a common scheme or plan because there is no evidence that Field, at any point, planned to sexually abuse T.B. and to later sexually abuse H.P. or, for that matter, anyone else.

These cases differ from *State v. Schwartzmiller*, 107 Idaho 89, 685 P.2d 830 (1984), relied upon by the State, where a common scheme or plan was deemed to exist because the defendant's behavior demonstrated a scheme of repeatedly finding and grooming victims by frequenting areas where young boys gathered, befriending boys who had no father figure, enticing them from their homes, lowering their inhibitions with drugs and alcohol, and, after this lengthy grooming process, committing sex acts with them. Here, by contrast, the described offenses are crimes of opportunity, not the culmination of a grooming plan or process. The only similarity is that in both cases Field is alleged to have seized opportunities to sexually abuse minor females when they were at his home; there is no common scheme or plan running between or linking the charged acts to justify joining the cases into a single trial.

We also disagree with the State's contention that the requisite connection between the two charges is established by the overlapping evidence that would have been admissible in each trial if separate trials had been ordered. Although some evidence of Field's alleged sexual battery of T.B. may have been admissible in the lewd conduct case involving H.P., and vice

versa, much of the detailed evidence in each case would likely have been excluded as irrelevant or unduly prejudicial in the other case. Indeed, it appears that there was far less overlapping evidence between the cases than there was case-specific evidence that would have been excluded in the other trial. In particular, as we have already held, K.A.'s testimony regarding Field's sexual remarks to her the morning after his encounter with T.B. was not admissible on the charge of lewd conduct with H.P.

This case is similar to *Anderson* where we considered the joinder for trial of a misdemeanor battery charge and a resisting arrest charge. It was alleged that the resisting arrest offense arose when Anderson fled from officers while they were attempting to serve a warrant for the misdemeanor battery. We held that the offenses lacked a sufficient nexus to be joined for trial. We noted that the police pursuit, when Anderson resisted arrest, occurred three months after the battery and involved different persons, and the offenses did not involve overlapping evidence that could most efficiently be presented by a joint trial. The prosecution witnesses in the two cases were different, and "[a]lthough evidence that one offense had occurred may have been admissible in the trial of the other, the detailed evidence would likely have been precluded as irrelevant or unduly prejudicial." *Anderson*, 138 Idaho at 362, 63 P.3d at 488. Therefore, we held that the joinder was error. The same considerations expressed in *Anderson* require a conclusion here that the lewd conduct and sexual battery charges should not have been joined into a single trial.

D. Cumulative Error

We have held that there was error in the admission of testimony concerning H.P.'s hearsay statements to her sister and mother, that all of K.A.'s testimony was inadmissible on the charge involving H.P., and part of it was inadmissible on the charge involving T.B., and that the cases were improperly joined for trial, resulting in the jury hearing a quantity of detailed evidence about each alleged offense that would not have been admissible in the trial of the other offense. The question now presented is whether these errors necessitate a new trial in either or both cases. Individual errors will be deemed harmless if this Court is persuaded beyond a reasonable doubt that the jury would have reached the same verdict in the absence of the error. I.C.R. 52; *State v. Robinett*, 141 Idaho 110, 113, 106 P.3d 436, 439 (2005); *Anderson*, 138 Idaho at 362, 63 P.3d at 488; *Peite*, 122 Idaho at 821, 839 P.2d at 1235. But even if individual errors, considered separately, would be harmless, a defendant will be entitled to a new trial if when

aggregated, the collection of irregularities deprived the defendant of a fair trial. *State v. Hill*, 140 Idaho 625, 631, 97 P.3d 1014, 1020 (Ct. App. 2004).

Applying these standards, we conclude that the judgment of conviction must be vacated and a new trial granted on the charge that Field committed lewd conduct with H.P., for we cannot be confident that the jury would have found guilt on that charge in the absence of the improperly admitted hearsay testimony concerning H.P.'s out-of-court statements, K.A.'s testimony, and the detailed evidence heard by this jury concerning the charge for sexual battery of T.B.

As to the charge for sexual battery of T.B., however, we conclude that the errors were harmless because the evidence of Field's guilt is overwhelming. In particular, the recorded pre-text telephone calls made to Field by T.B. in which Field apologized to her for his behavior corroborated T.B.'s testimony about the molestations. K.A.'s testimony concerning Field's behavior the morning after the molestation of T.B. is also significantly corroborative. Considering the totality of the properly admitted evidence, we are convinced beyond a reasonable doubt that the jury would have found Field guilty of sexual battery of T.B. even if the trial errors had not occurred. Field's conviction for sexual battery is therefore affirmed.

E. Excessive Sentence

Field also argues that the sentences imposed by the district court are excessive. Because we have vacated Field's conviction for lewd conduct we need address only his sexual battery sentence, a unified sentence of fifteen years' imprisonment with five years determinate. We review a sentence on appeal for abuse of the sentencing court's discretion. *See State v. Brown*, 121 Idaho 385, 393, 825 P.2d 482, 490 (1992); *State v. Sanchez*, 115 Idaho 776, 769 P.2d 1148 (Ct. App. 1989); *State v. Toohill*, 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct. App. 1982). The objectives of sentencing, against which the reasonableness of a sentence is to be measured, are the protection of society, the deterrence of crime, the rehabilitation of the offender and punishment or retribution. *Id.* In examining the reasonableness of a sentence, we conduct an independent review of the record, focusing on the nature of the offense and the character of the offender. *State v. Young*, 119 Idaho 510, 511, 808 P.2d 429, 430 (Ct. App. 1991). We will find that the trial court abused its discretion in sentencing only if the defendant, in light of the objectives of sentencing, shows that his sentence was excessive under any reasonable view of the

facts. *State v. Charboneau*, 124 Idaho 497, 499, 861 P.2d 67, 69 (1993); *Brown*, 121 Idaho at 393, 825 P.2d at 490.

Prior to the current offense, Field had a history of criminal behavior, including at least three felony convictions. At sentencing, he did not accept responsibility for the offense against T.B. nor express any remorse for his actions. A psychological evaluator concluded that Field should not be allowed in the presence of underage females as he poses a significant threat to them, and that he was not an appropriate candidate for sex offender treatment "until he gains insight into some of his deviant behaviors." The district court properly concluded that the objectives of deterrence and the protection of society required a significant period of incarceration. The sentence chosen by the district court is not excessive.

III.
CONCLUSION

As to the sexual battery charge against Field, the trial errors were harmless and the sentence imposed is not excessive. Therefore, the judgment of conviction and sentence for sexual battery is affirmed. We have concluded, however, that the errors cumulatively denied Field his right to a fair trial on the lewd conduct charge. Therefore, the judgment of conviction for lewd conduct is vacated and the case remanded for further proceedings.

Chief Judge PERRY and Judge GUTIERREZ **CONCUR.**